

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT J. BROMILEY and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 98-2365; Submitted on the Record;
Issued August 29, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization of back surgery.

On July 23, 1992 appellant, then a 37-year-old marine machinist, filed a claim for injuries sustained on that date in a motor vehicle accident. The Office accepted appellant's claim for cervical strain, an aggravation of lumbosacral strain and a contusion to the head.¹ Appellant stopped work and did not return.

A magnetic resonance imaging (MRI) study of appellant's cervical spine obtained on August 25, 1992 revealed a "small central disc herniation, C5-6 interspace, which exerts minimal to mild mass effect upon the adjoining spinal cord." An MRI of the lumbar spine dated August 24, 1992, showed a L5-S1 disc protrusion without effect on the adjoining nerves.

In a report dated May 23, 1994, Dr. Emil L. Matarese, a Board-certified neurologist and appellant's attending physician, listed findings of tenderness, spasm and reduced range of motion of appellant's cervical and lumbar spine. Dr. Matarese stated:

"[Appellant] has chronic cervical and lumbar pain due to chronic cervical and lumbar radiculopathy due to disc herniations. Disc herniations are at the C5-6 level in the cervical spine and at the L5-S1 level of the lumbar spine. [Appellant] has failed lengthy and comprehensive conservative treatment and now requires surgical intervention in [an] attempt to return him to a pain free state."

¹ The record indicates that at the time of his July 23, 1992 motor vehicle accident appellant worked permanent limited duty due to a prior employment injury to his lower back.

On August 26, 1996 appellant underwent a complete myelogram.² A post myelogram computerized tomography (CT) scan, revealed as follows:

“Evaluation of the C5-6 level shows a focal, central soft tissue density protruding into the anterior aspect of the spinal canal, probably representing a bulging disc. The canal is further narrowed in the AP [anteroposterior] diameter by posterior osteophytes and these do encroach upon the neural foramina on the right. The left-sided neural foramina remain present.”

In an office visit note dated September 5, 1996, Dr. Joseph V. Conroy, a Board-certified neurosurgeon, noted that appellant required an anterior cervical fusion to repair an osteophyte at C5-6.

In a report dated November 4, 1996, Dr. Conroy discussed appellant’s history of a July 23, 1992 motor vehicle accident and subsequent complaints of persistent pain in his back, neck, left arm and left leg. He indicated that, at the time of his initial treatment of appellant in April 1994, he had diagnosed lumbar and cervical radiculopathy. Dr. Conroy discussed the findings on the August 26, 1996 myelogram and noted that appellant wanted to proceed with a cervical fusion. He opined that following surgery appellant “may get 50 [percent] pain relief, but it certainly will not take away all his symptoms.”

In a report dated November 29, 1996, an Office medical adviser reviewed the medical evidence and opined that appellant did not require surgical intervention. He found that myelograms of appellant’s cervical and lumbar spine “do not support either [appellant’s] complaints or Dr. Conroy’s opinion that an anterior cervical fusion at C5-6 is appropriate.”

On March 20, 1997 an Office medical adviser opined that appellant’s surgery should not be authorized as it “would be directed at cervical osteophytes which are the result of degeneration and not the accepted work[-]related condition.”

In an internal memorandum dated April 2, 1997, the Office indicated that it would request that Dr. Easwaran Balasubramanian, a Board-certified orthopedic surgeon to whom to had referred appellant in January 1996 to resolve a conflict regarding the extent of his impairment, provide a finding regarding whether appellant required surgical intervention.³

² Although appellant’s attending physicians repeatedly requested authorization for a myelogram to determine whether he required surgery, the Office did not authorize the myelogram.

³ In his report dated March 8, 1996, Dr. Balasubramanian found that appellant had an employment injury to his neck and back but that the findings on examination and appellant’s “description of pain does not follow a pattern suggesting a herniated disc at this time” and noted findings of possible symptoms magnification. He found that appellant could returned to modified employment.

In a report dated April 17, 1997, Dr. Balasubramanian stated:

“Based on my examination and review of the records, I do not feel that the cervical disectomy and fusion would be helpful to [appellant] at this time. Because of the lack of concrete neurological findings on my examination and the records reviewed, I do not feel that such surgery would be beneficial to [appellant].”

In a report dated April 24, 1997, Dr. Matarese listed findings on examination and related:

“[Appellant] has a chronic pain syndrome with cervical and lumbar radiculopathy which has failed multiple conservative therapies. The only other option available in [an] attempt to return [him] to a pain free state and gainful employment is surgical decompression of the cervical and lumbar regions.”

In a report dated April 29, 1997, Dr. William F. Bonner, a Board-certified physiatrist, noted that the Office had accepted only a cervical sprain, aggravation of lumbar strain and a head contusion as employment related. He recommended that appellant proceed with the surgery proposed by Dr. Conroy and stated:

“[The Office] fail[s] to mention that [appellant] suffers from a C5-6 radicular process which is a nerve root condition affecting the spine which causes his marked pain. This condition is solely the result of the work[-]related incident which occurred in July, 1992. It is beyond my belief that the [Office] fails to recognize this condition and the fact that this condition is why he needs the surgery performed. He does have cervical osteophytes which predisposed him to this nerve pathology but it is apparent that the car accident with a focal central disc bulge at C5-6 is the culprit in causing his pain complex as it affects the neck. His condition has been further outlined and explained in Dr. Conroy’s report of November 4, 1996, where the myelogram revealed a central disc herniation which is directly related to the motor vehicle accident and is not preexisting at all.”

In a report dated August 22, 1997, Dr. Matarese noted that appellant was “in obvious distress” on examination and again recommended surgical intervention.

In a report dated September 18, 1997, Dr. Conroy found that appellant would continue to have discomfort and permanent work restrictions even with the surgery. He stated that the “prognosis for a full recovery, is just about nil and at best could achieve 50 to 60 [percent].” Dr. Conroy noted that appellant wanted to proceed with the surgery.

By decision dated October 15, 1997, the Office reduced appellant’s compensation effective November 9, 1997 based on its determination that he could perform the duties of a motor vehicle dispatcher. The Office further found that, based on the opinion of the Office referral physician, Dr. Balasubramanian, appellant did not require surgery on his back.

On October 17, 1997 appellant requested a hearing on his claim. He submitted a chart note dated October 27, 1997 from Dr. Bonner, who opined that appellant should have surgery

which “hopefully will improve his overall condition.” Appellant further submitted reports dated November 14, 1997 and February 17, 1998, from Dr. Matarese, who continued to find that appellant required a surgical decompression.

A hearing was held on May 6, 1998. By decision dated July 9, 1998, the hearing representative set aside the Office’s October 15, 1997 wage-earning capacity determination and remanded the case for further development. The hearing representative affirmed the Office’s denial of authorization for surgery. The hearing representative noted that the Office had used Dr. Balasubramanian as a second opinion physician regarding the need for surgical intervention on appellant’s back.⁴

The Board finds that the case is not in posture for decision due to a conflict in medical opinion.

Section 8103 of the Federal Employee’s Compensation Act⁵ provides for the furnishing of “services, appliances and supplies prescribed or recommended by a qualified physician” which the Office, under authority delegated by the Secretary, “considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.”

The Office’s obligation to pay for medical treatment under section 8103 of the Act extends only to treatment of employment-related conditions. Appellant has the burden of establishing that the requested treatment is for the effects of an employment-related condition by the submission of rationalized medical evidence addressing causal relationship.⁶

In this case, appellant’s attending physician, Dr. Matarese opined that appellant required surgical decompression to repair disc herniations. In an office visit note dated September 5, 1996, Dr. Conroy, found that appellant required an anterior cervical fusion to repair an osteophyte at C5-6. In subsequent reports, he indicated that appellant might obtain 50 percent pain relief from the surgery but would continue to have symptoms and limitations. In a report dated April 29, 1997, Dr. Bonner related that appellant’s disc bulge at C5-6 was caused by his employment injury and that while his cervical osteophytes “predisposed him to this nerve pathology it is apparent that the car accident with a focal central disc bulge at C5-6 is the culprit in causing his pain complex as it affects the neck.” He recommended that appellant proceed with the surgery suggested by Dr. Conroy.

An Office medical adviser, on the other hand, found in a report dated November 29, 1996 that appellant did not require surgery. In a report dated March 20, 1997, an Office medical adviser opined that surgery should not be authorized as it would be to repair cervical osteophytes

⁴ After noting that Dr. Balasubramanian provided a second opinion evaluation regarding the need for surgery, the hearing representative proceeded to give his opinion special weight as impartial medical specialist on the issue of surgical authorization.

⁵ 5 U.S.C. §§ 8101-8193, 8103.

⁶ See *Zane H. Cassell*, 32 ECAB 1537 (1981).

which were not related to the employment injury. In a report dated April 17, 1997, Dr. Balasubramanian advised against a cervical discectomy and fusion due to “the lack of concrete neurological findings on my examination and the records reviewed.”

Section 8123(a) of the Act,⁷ provides, “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

The Office medical consultant and the second-opinion physician, Dr. Balasubramanian, recommend against surgery while appellant’s physicians, Drs. Matarese, Conroy and Bonner, supported surgical intervention. The Office medical consultant opined that surgery would be due to repair cervical osteophytes unrelated to the employment injury while Dr. Bonner opined that the need for surgery resulted from appellant’s July 1992 motor vehicle accident. Consequently, the case will be remanded for the Office to refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an impartial medical examination to resolve the conflict regarding whether surgery is appropriate and whether the need for surgery results from the July 23, 1992 motor vehicle accident.

The July 9, 1998 decision of the Office of Workers’ Compensation Programs is hereby set aside on the issue of authorization of surgery and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
August 29, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁷ 5 U.S.C. § 8123(a).